Nos. 78-1737, 78-1838 and 79-93

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN P. FOLEY, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT L. GRUEN, INC., PETITIONER

v.

UNITED STATES OF AMERICA

SHANNON & LUCHS COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a)[1] is reported at 598 F. 2d 1323. The district court's memorandum and order denying petitioners' motion to dismiss (Pet. App. 31a-45a) is unreported.

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[1]Unless otherwise noted, "Pet." references are to the petition in No. 78-1737.

JURISDICTION

The judgments of the court of appeals were entered on April 19, 1979. The petition for a writ of certiorari in No. 78-1737 was filed on May 18, 1979. The petition for a writ of certiorari in No. 78-1838 was filed on June 8, 1979, and is therefore out of time under Rule 22(2) of the Rules of this Court. A petition for rehearing by Shannon & Luchs was denied on June 19, 1979 (79-93 Pet. App. 1a), and the petition for a writ of certiorari in 79-93 was filed on July 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the price-fixing activities of real estate brokers located in Montgomery County, Maryland, are within the reach of the Sherman Act as activities "in restraint of trade or commerce among the several States * * *." 15 U.S.C. 1.

2. Whether the district court properly instructed the jury on the degree and nature of criminal intent necessary to support a conviction under Section 1 of the Sherman Act.

STATEMENT

On April 1, 1977, a federal grand jury in Maryland charged six corporations and three individuals with violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to raise real estate brokerage commission rates on the sale of homes in Montgomery County, Maryland, from six to seven percent. After a jury trial in the United States District Court for the District of Maryland, the defendants were convicted and sentenced to suspended prison terms and fines.[2] The court of appeals affirmed (Pet. App. 1a-29a).

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[2]Petitioners are two of the individual defendants and four of the corporate defendants.

1. Prior to September 1974, the prevailing real estate commission on the sale of residential property in Montgomery County, Maryland, was six percent (Pet. App. 3a). Although several petitioners were dissatisfied with this rate and desired to raise it to seven percent, they feared that they would lose business to competitors who continued to charge six percent (*id.* at 13a). Petitioner Foley, in particular, entertained this fear (J.A. 657).[3] Therefore, before raising his commission rate to seven percent, he invited executives of several of his largest competitors to a dinner at Congressional Country Club to discuss "something of great importance to the real estate industry" (J.A. 126). Nine persons attended this dinner, including petitioners Foley and Carruthers and executives of petitioners Robert L. Gruen, Inc., and Shannon & Luchs Co. The "something of great importance" turned out to be a discussion of real estate commission rates and an agreement to raise them to seven percent.

Petitioner Foley opened the discussion by announcing his intention to raise his prices to seven percent (Pet. App. 4a). The group then discussed the commission rate and, as petitioner Shannon & Luchs' vice-president put it, "I wouldn't say that the comments were purely innocent" (J. A. 333). The several real estate executives questioned each other as to their intentions with regard to raising commission levels. Executives of petitioners Colquitt-Carruthers, Inc. and Robert L. Gruen, Inc., as well as other persons, stated that they would raise their commissions to seven percent (Pet. App. 15a, 18a). Petitioner Shannon & Luchs' vice-president, noting that his firm was frequently a target of government antitrust

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[3]"J.A." refers to the Joint Appendix in the court of appeals.

investigations, said that its commission rate would probably go to seven percent but would not be raised until a later date (*id.* at 17a).[4]

Following the dinner, the several realty firms raised their commission rates from six to seven percent for most—and in some cases essentially all—of their sales (Pet. App. 4a). Petitioners Carruthers and Foley thereafter encouraged their fellow realtors to keep the rates up, telling them that it would be a mistake not to stay at seven percent and that price competition would prevent any of them from maintaining the more profitable seven percent rate (*id.* at 14a-16a).[5] In short, the evidence at trial amply proved a classic price-fixing conspiracy.

2. Petitioners moved to dismiss the indictment, contending that their activity was outside the scope of the Sherman Act because real estate sales are not in, and do not substantially affect, interstate commerce. The district court denied the motion, holding that petitioners' substantial involvement in interstate transactions and sales brings their conduct within the reach of the Sherman Act (Pet. App. 41a):

> [Petitioners] are * * * companies and businessmen who conduct multimillion dollar operations, who are located in a large expanding metropolitan area and whose services are used by buyers and sellers moving into and out of Maryland, who assist in arranging financing of residential properties sold with

[4]In fact Shannon & Luchs did raise its rate in January 1975 (Pet. App. 17a).

[5]For example, Carruthers telephoned an executive of Shannon & Luchs to complain that that firm was taking six percent listings at its Gaithersburg office. The executive acknowledged that there was a "problem" in Gaithersburg but assured Carruthers that he was "working" on it (Pet. App. 18a; J.A. 175-176).

> governmental and lending agencies outside of Maryland, who attract purchasers through the use of multistate referral services, and who advertise their brokerage business interstate.

The court of appeals upheld the denial of this motion. It noted that the record revealed that petitioners operate within "a substantial interstate market" (Pet. App. 11a) for real estate in the Washington, D.C. area, that petitioners engaged in extensive interstate advertising of their services, attracted out-of-state buyers by participation in national relocation services, and assisted buyers in obtaining out-of-state loans, and that a substantial portion of petitioners' sales involved persons moving into or out of the state (*id.* at 9a-12a).

ARGUMENT

1. Petitioners contend that their activity falls outside the scope of the Sherman Act because real estate sales are not in, and do not substantially affect, interstate commerce. This contention was properly rejected by both courts below (Pet. App. 5a-12a, 41a). The court of appeals correctly observed (*id.* at 11a, quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784 (1975)) that "[t]he overall picture that emerges [from the evidence] is one of a substantial stream of interstate commerce in which these brokers' activities were not only an 'integral part,' but in practical effect the dominant factor in * * * creating a substantial interstate market * * *." For the reasons elaborated in the decision of the court of appeals and in the brief of the United States as *amicus curiae* in *McLain* v. *Real Estate Board of New Orleans, Inc.*, cert. granted, No. 78-1501 (May 14, 1979), petitioners' real estate activities fall within the scope of the Sherman Act as activities in, and substantially affecting, interstate commerce.[6]

[6]We are providing petitioners with a copy of our *amicus* brief in *McLain*.

We note, however, that the question raised by petitioners in this case is essentially identical to the question presented in *McLain*, which the Court will consider in the 1979 Term. The question whether real estate brokerage activities substantially affect commerce was decided in *McLain* on a motion to dismiss on the pleadings rather than on a complete factual record. While the Court may wish to defer disposition of this petition pending its decision in *McLain*, we submit that the detailed record in this case amply supports the lower courts' conclusion that petitioners' real estate activities have a substantial effect on interstate commerce.[7]

2. a. Petitioners in No. 78-1737 contend (Pet. 15-16) that the record in this case does not reflect an intent to restrain trade but reveals only "self-regarding but independent decisions" to raise commission levels. This claim is merely a challenge to the sufficiency of the evidence that petitioners agreed to fix the price at which they would offer their services. This factual contention was properly rejected by the court of appeals (Pet. App. 12a-20a) and does not warrant further review.

b. Petitioners in No. 78-1737 contend that a conviction for violation of Section 1 of the Sherman Act requires a showing of "specific intent" to violate the law (Pet. 13-14). This contention is insubstantial.

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[7]We disagree with petitioners' suggestion (79-93 Pet. 15) that this case should be considered for review along with *McLain*. In our brief as *amicus curiae* in *McLain* we noted (Br. 15) that that case concerned the failure of the courts to allow the plaintiff an opportunity to prove his allegations at trial. It is unnecessary to review a lengthy factual record, such as this case possesses, to conclude in *McLain* that the allegation that real estate brokerage activity substantially affects commerce is not so frivolous as to warrant dismissal for lack of subject matter jurisdiction under the Sherman Act (see *ibid.*).

As this Court held in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), a showing that antitrust conspirators acted with a specific desire "to violate the law would seem * * * both unnecessarily cumulative and unduly burdensome." *Id.* at 446. It is instead sufficient to show that the unlawful action was undertaken "with knowledge of its probable [anti-competive] consequences * * *." *Id.* at 448.[8] This requirement was fulfilled in this case by the trial court's instruction that the jury could convict the defendants only if it found beyond a reasonable doubt that they knowingly entered into an agreement the objective of which was to "fix, raise and maintain real estate commission rates * * * in Montgomery County, Maryland * * *" (J.A. 915).[9]

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[8]Petitioners suggest (Pet. 13-14) that because a violation of Section 1 is now a felony rather than a misdemeanor, "specific intent" to violate the law must be shown even though it was not previously required by this Court in *Gypsum*. But in *Gypsum* the Court was well aware that the Antitrust Penalties and Procedures Act of 1974 had made violation of Section 1 a felony (see 438 U.S. at 442 n.18), yet it concluded nonetheless that specific intent to violate the law need not be shown. This conclusion is supported by the fact that Congress, in enacting the 1974 Act, did not make any change in the substantive provisions of the Sherman Act but merely sought to increase penalties for violations (Pet. App. 21a). See, *e.g.*, 120 Cong. Rec. 36340 (1974) (remarks of Rep. Hutchinson). Accord, *United States* v. *Brighton Building & Maintenance Co.*, No. 77-2295 (7th Cir. June 7, 1979), pets. for cert. pending, Nos. 78-1872 and 79-111.

[9]The court instructed the jury that the offense charged (J.A. 915, 908-909)

> is that the Defendants entered into a combination and conspiracy to fix, raise and maintain real estate commission rates * * * in Montgomery County, Maryland * * *.
>
> * * * * *
>
> What must be proved beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that two or more parties, including one or more of the Defendants * * * knowingly became members of the conspiracy which is charged in the indictment in this case.
>
> * * * * *

Petitioners argue, however, that even though they were shown to have knowingly entered into an agreement for the purpose of fixing prices, this instruction did not also require proof that they thereby intended to restrain trade (78-1737 Pet. 17-18; 78-1838 Pet. 5-8). Yet the court explicitly charged that, in order to convict, the jury must find that "the combination or conspiracy * * * had as its object unreasonable restraint of trade in Montgomery County" (J.A. 901-902).

In any event, petitioners' argument has been rejected by every court of appeals that has considered it.[10] This is a

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However, before you find that a Defendant became a member of the conspiracy charged, the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the Defendant knowingly participated in the unlawful plan with the intent to further or advance some object or purpose of the conspiracy.

[10]See *e.g.*, *United States* v. *Gillen*, 599 F. 2d 541 (3d Cir. 1979), pet. for cert. pending, No. 79-58; *United States* v. *Continental Group, Inc.*, Nos. 78-2328, *et seq.* (3d Cir. July 20, 1979); *United States* v. *Brighton Building & Maintenance Co.*, No. 77-2295 (7th Cir. May 18, 1979), pets. for cert. pending, Nos. 78-1872 and 79-111.

To the extent that petitioners seek to rely on *Gypsum* in support of this contention (Pet. 17-18), that reliance is misplaced. In *Gypsum*, the Court struck down a jury instruction that allowed the jury to convict defendants of a Section 1 violation regardless of intent: so long as the result of defendants' information-exchange agreement was the stabilization of prices, the defendants were conclusively presumed to have intended to stabilize prices. The vice of this instruction, the Court emphasized, was that it did away with intent entirely and converted Section 1 into a strict liability offense. *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 446. The district court's instruction in this case sharply contrasts with that in *Gypsum*, for here the court permitted conviction only if the jury found from defendants' conduct that they knowingly entered into an agreement with the intent to fix prices. See, *e.g.*, J.A. 906, 910. Petitioners' suggestion that the instructions should have required proof not only that they intended to raise prices but also that they thereby intended to restrain trade is analogous to the argument rejected in *Gypsum* (438 U.S. at 446) that there must be proof that the conspirators desired "to violate the law." See also pages 10-11, *infra*.

price fixing case. For over 50 years the decisions of this Court in criminal and civil cases alike have made it clear that price fixing is *per se* illegal: that is, price fixing is so plainly anticompetitive that no elaborate inquiry need be made into the actual effects of the conspiracy or the possible beneficial motives of the defendants. See, *e.g.*, *United States* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States* v. *Topco Associates*, 405 U.S. 596 (1972); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978); *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 440. Proof that petitioners intended to engage in price fixing establishes not only that they knew of the anticompetitive effects of their conduct, but also that they had the purpose of imposing such effects on the marketplace.[11] There is no need to open inquiry in every price fixing case into the probable effects of the conspiracy, for, as the Third Circuit explained in *United States* v. *Gillen*, *supra*, 599 F. 2d at 545, " '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.' Thus, the conscious object of every price-fixing conspiracy is an illegal act." Where defendants have acted with an intent to fix prices, "questions of knowledge of probable consequences and indeed of 'conscious object' appear clearly answered." *Id.* at 546.

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[11]As the court of appeals explained in *United States* v. *Brighton Building & Maintenance Co.*, *supra*, slip op. A-9, " '[s]ince the *per se* rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act reads: 'An agreement among competitors to rig bids is illegal.' "

c. Petitioner Shannon & Luchs contends (79-93 Pet. 2) that it acted independently in raising its prices and that the jury might have found petitioner to be a member of the conspiracy solely because of this individual action. This claim is based on one sentence in the jury instructions which states that each defendant's knowing participation in the conspiracy could be proven by showing "a knowing assistance of any kind in effectuating the objective of the conspiracy" (J.A. 909).

The court of appeals correctly concluded that the jury instructions, read in their entirety, were proper (Pet. App. 22a). See *United States* v. *Park*, 421 U.S. 658 (1975). The district court charged the jury that the evidence must show beyond a reasonable doubt that the conspiracy was knowingly formed and that each defendant knowingly participated in it with the intent to further or advance some object or purpose of the conspiracy (J.A. 908-909). Then, as an example of what constitutes knowing participation in the conspiracy, the court stated that "knowing assistance of any kind in effectuating the objective of the conspiracy" (J.A. 909) would suffice. At the same time, however, the court emphasized the following:

> A Defendant may be found guilty of a conspiracy only if the Defendant understood that he had joined the single overall conspiracy that is charged. *If any Defendant was not a party to that overall agreement or conspiracy, you must find that Defendant not guilty even if he participated in isolated or subsidiary actions or events which aided the ends of the conspiracy.*

> Thus, if you find a Defendant engaged in particular acts of raising commission rates but that these were not part of the overall conspiracy, that is to say, were not pursuant to an agreement, you must find that Defendant not guilty.

J.A. 910 (emphasis supplied). These instructions were given after the judge had repeatedly told the jury that the government must show each defendant's participation in an unlawful agreement

> * * * as a matter of conscious choice on the part of each Defendant, beyond the [sic] reasonable doubt.
>
> It is not enough to show only that the parties acted uniformly or similarly or in ways that may seem to be mutually beneficial.
>
> If such actions were taken independently, as a matter of individual business judgment, without any agreement or arrangement or understanding among the parties, then there would be no conspiracy * * *.

J.A. 906. See also J.A. 903-005, 907-908, 913-915.

Viewed as a whole, the instructions thus plainly required the jury to find that each defendant participated in the conspiracy by agreeing to its unlawful ends and taking some further action toward achieving the common objectives.

CONCLUSION

The petitions for a writ of certiorari should be denied. The Court may wish to defer disposition of the petitions, however, pending the decision in *McLain* v. *Real Estate Board of New Orleans*, *supra*.

Respectfully submitted.

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AUGUST 1979

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